

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-2020

In The  
**United States Court of Appeals**  
For The Second Circuit  

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CALVIN WILLIAMS,

*Petitioner-Appellant,*

- against -

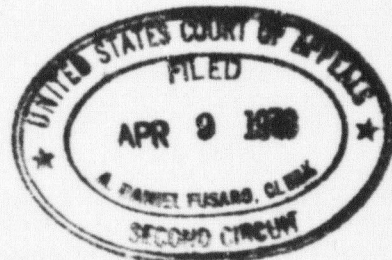
Attorney General of the State of New York, District Attorney  
for the County of Kings, Corporation Counsel for the City of  
New York, Commissioner, New York City Department of  
Corrections, and Presiding Justice of the Supreme Court, Kings  
County, Part 27,

*Respondents-Appellees.*

*On Appeal From the United States District Court for the  
Eastern District of New York*

## APPELLANT'S APPENDIX

HAROLD B. FONER & IRA LEITEL  
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## TABLE OF CONTENTS

|  | Page |
|--|------|
| Docket Entries . . . . .   | 1a   |
| Order to Show Cause (Filed December<br>31, 1975) . . . . .   | 2a   |
| Petition For Writ of Habeas Corpus (Filed<br>December 31, 1975) . . . . .  | 5a   |
| Exhibits Annexed to Foregoing Petition:  |      |
| A — Indictment . . . . .   | 13a  |
| B — Law Journal Decision of Supreme<br>Court . . . . .   | 16a  |
| C — Certificate Denying Leave . . . . .  | 17a  |
| D — Abstract of the Testimony of Cal-<br>vin Williams Before the Fourth Ad-<br>ditional December 1970 Grand Jury,<br>June 26, 1972 . . . . . | 18a  |
| E — Part of Prosecutor's Summation . . .   | 19a  |
| F — Request to Charge . . . . .  | 20a  |
| G — Court Charge . . . . .   | 21a  |
| H — Exception to Court Charge . . . . .  | 47a  |

## Contents

|  | Page |
|--|------|
| Affidavit of Mark M. Baker in Opposition<br>(Filed January 26, 1976) . . . . . | 48a  |
| Appendix to Affidavit . . . . .  | 52a  |
| Opinion and Order (Filed January 27, 1976) .                                   | 53a  |
| Judgment (Filed January 29, 1976) . . . . .                                    | 58a  |
| Certificate of Probable Cause (Filed Feb-<br>ruary 17, 1976) . . . . .         | 59a  |



# DOCKET ENTRIES

1a

12-31-75 PETITION FOR A WRIT OF HABEAS CORPUS FILED, (See doc. #1.)  
 By PLATT, J.--ORDER TO SHOW CAUSE FILED, ret. 1-7-76 for an order  
 restraining the Judges of the Supreme court, Kings Cty. from ex-  
 ecuting sentence, etc. on Calvin Williams, without proof of service  
 and without TRO. (1)

12-31-75 Petitioner's brief filed. (1)

12-31-75 Before PLATT, J.--Case called for hearing on TRO. Motion  
 argued. TRO denied. Hearing on order to show cause adjd to  
 1-7-76 at 9:30 am. (2)

1-7-76 Affidavit of Service on Order to Show Cause filed. (3)

1-7-76 Before PLATT, J.--Case called. Order to show cause restraining  
 respondents argued. Decision reserved.

1-26-76 Affidavit of Mark M. Baker filed. (my) (4)

1-27-76 By PLATT, J.-- Opinion and Order dated 1/27/76 filed the petitioner's  
 motion and petition for a writ of habeas corpus must be and the  
 same hereby are denied. Copy of Order mailed to the parties. (5)

1-29-76 Judgment dtd. 1-29-76 that the petitioner take nothing of the responden  
 and that the motion and petition are denied filed. (6)

1-5-76 NOTICE OF APPEAL filed. Copy of notice of appeal and copy of docket  
 sheet mailed to Court of Appeals. (7)

1-11-76 Before PLATT, J.-- Case called. Motion of application fro certificate  
 of probable cause for bail argued. Motion granted.as indicated  
 Order to be submitted. (7)

1-17-76 By PLATT, J--Certificate of probable cause dtd 2-13-76 filed. p/c (8)

BEST COPY AVAILABLE



IN THE UNITED STATE DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

CALVIN WILLIAMS,

Petitioner,

-against-

ATTORNEY GENERAL OF THE STATE OF NEW  
YORK, DISTRICT ATTORNEY FOR THE COUNTY  
OF KINGS, CORPORATION COUNSEL FOR THE  
CITY OF NEW YORK, COMMISSIONER, NEW  
YORK CITY DEPARTMENT OF CORRECTIONS,  
and PRESIDING JUSTICE OF THE SUPREME  
COURT, KINGS COUNTY, PART 27.,

Respondents.

PLATT, J.

No.

ORDER TO SHOW  
CAUSE

Upon the verified petition, and exhibits referred to  
and attached, of CALVIN WILLIAMS for issuance of a Writ of  
Habeas Corpus and all the papers and proceedings had herein.

LET, the respondents show cause before this Court at  
the United States Courthouse, 225 Cadman Plaza East, Borough of  
Brooklyn at a stated term thereof, on the 17<sup>th</sup> day of JANUARY  
1976 at 9:30 o'clock in the forenoon or as soon thereafter as  
counsel can be heard.

WHY, an order should not be made restraining and pro-  
hibiting the Judges of the Supreme Court of the County of Kings  
and more particularly the Judge presiding in Part 27, County  
of Kings, on the 5th day of January 1976, from executing sen-  
tence and committing CALVIN WILLIAMS to the Commissioner of  
Corrections of The City of New York for six months, or



WHY, a further order should not be made restraining and prohibiting the Commissioner of Corrections of the City of New York from detaining Calvin Williams, or in the alternative,

WHY, a further order should not be made granting a Writ of Habeas Corpus discharging petitioner from custody as of the day he is incarcerated.

~~Pending the determination of the application herein, LET all proceedings pending against the petitioner herein, CALVIN WILLIAMS, under Indictment Number 1404/71, be stayed. And that~~  
 — security be required to be posted by Petitioner.

Sufficient cause appearing therefore, LET service of a copy of this order and the papers thereto annexed upon respondents, on or before January 2, 1976, at 6 o'clock P.M. be deemed sufficient service.

Brooklyn, New York  
 DATED: DEC. 31<sup>ST</sup>, 1975 at 2.30 P.M.

ENTER

Thomas C. Platt

TO: Louis J. Lefkowitz  
 Attorney General of the State  
 of New York  
 2 World Trade Center  
 New York, New York

45DJ

W. Bernard Richland  
 Corporation Counsel City of  
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Benjamin J. Malcolm  
Commissioner, New York City  
Department of Corrections  
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New York, New York 10013

Eugene Gold  
District Attorney,  
Kings County  
Municipal Building  
Brooklyn, New York 11201

Hon. Presiding Justice of the  
Supreme Court  
Kings County  
Criminal Term, Part 27  
120 Schermerhorn Street  
Brooklyn, New York

Clerk of the Court  
United States District Court  
225 Cadman Plaza East  
Brooklyn, New York



PETITION FOR WRIT OF HABEAS CORPUS (FILED DECEMBER 31, 1975)  
IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

CALVIN WILLIAMS,

Petitioner,

-against-

PETITION FOR WRIT  
OF HABEAS CORPUS

ATTORNEY GENERAL OF THE STATE OF NEW  
YORK, DISTRICT ATTORNEY FOR THE COUNTY  
OF KINGS, CORPORATION COUNSEL FOR THE  
CITY OF NEW YORK, COMMISSIONER, NEW  
YORK CITY DEPARTMENT OF CORRECTIONS,  
and PRESIDING JUSTICE OF THE SUPREME  
COURT, KINGS COUNTY, PART 27.

Respondents.

---

To the Honorable  
United States District Court Judge for the Eastern District  
of New York.

Comes the petitioner, CALVIN WILLIAMS, and petitions  
this Court for a Writ of Habeas Corpus pursuant to 28 U.S.C.  
Section 2241. The petition of CALVIN WILLIAMS, respectfully  
shows to this Court:

1. Petitioner is unlawfully and unjustly restrained  
of his liberty by the above-named respondents, and is not  
detained solely by virtue of his posting one thousand dollars  
bail pending appeal.

2. Petitioner must surrender himself to begin serv-  
ing a six month sentence in the custody of the Commissioner



of Corrections of the New York City Department of Corrections, at the Brooklyn Criminal Court, Court House, Supreme Court, Part 27 located at 120 Schermerhorn Street, Kings County, in the State of New York, on January 5, 1976.

3. On or about June 26, 1972, petitioner was indicted by a Grand Jury for the County of Kings, State of New York, under Indictment No. 1404/1971, and charged with perjury in the first degree. (A copy of the indictment is annexed hereto as Exhibit A). Thereafter, petitioner was tried on the aforesaid indictment before a jury and the Hon. Albert S. McGrover, Justice of the Supreme Court, Kings County. The Jury returned a verdict of guilty on the only count on July 5, 1974.

4. On September 25, 1974, petitioner was sentenced to a term of imprisonment not to exceed six months. Thereafter, the conviction was affirmed by the Appellate Division, Second Department, on June 19, 1975 without opinion (see Exhibit B), and on December 10, 1975 the New York Court of Appeals denied leave for petitioner to appeal to that Court, without opinion (Exhibit C). Petitioner has exhausted every state remedy available to him.

5. The conviction and sentence by which petitioner is being restrained was imposed in violation of defendant's right against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutor's



remarks on summation and the trial court's charge to the jury.

6. The facts showing these violations of constitutional law are as follows: On June 28, 1974 the second trial (the first trial having ended in a mistrial caused by a hopelessly deadlocked jury) of petitioner began. The testimony elicited from the prosecution's witnesses was to the effect that on August 9, 1970 a dark blue Dodge proceeding down Marion Street in Brooklyn swerved to avoid a dog running across the street and struck two parked cars. The prosecution proceeded to call several witnesses who testified that petitioner was not the person driving the car that had first been in the accident.

As a part of the prosecution's case, pursuant to a stipulation by both parties, the jury was informed that the indicting grand jury "was a legally constituted and empanelled Grand Jury and had a legal and proper existence on June 26, 1972, and that the questions asked of Mr. Williams, which are the subject of the indictment, were material and relevant to the investigation".

It was also stipulated before the jury that petitioner testified before the Grand Jury as follows:

Mr. Friedman: At this time, I'm going to read from People's I in evidence, which is the abstract of the testimony of Calvin Williams before the Fourth Edition, December 1970 Grand Jury, taken June 26, 1972.



Calvin Williams, residing at 467 Macon Street, Brooklyn, New York, having been duly sworn testified as follows:

"Question: Do you recall being involved in an automobile accident that occurred on August 9, 1970 in the vicinity of Marion Street in the County of Kings?

"Answer: Yes.

"Question: Will you tell the Grand Jury what, if anything, you recall concerning the accident?

"Answer: Yes. It was in the afternoon, and a summer afternoon. I was driving down the street and I scraped two parked cars that was parked.

"Question: What time in the afternoon was that?

"Answer: I don't recall. It was in the dusk of the afternoon.

That's People's exhibit.  
1. The People Rest  
(Exhibit D).

The prosecution thereafter rested its case. The defense called its first and only witness, a police officer who responded to the scene of the accident, and after that testimony, rested. Petitioner did not testify at the trial.

The Court then inquired of defense counsel: "I assume too you want me to charge failure to take the stand in this case." Defense counsel replied in the affirmative. (~~Exhibit~~ E).

The prosecutor, in his summation, commented on petitioner's failure to testify at the trial as follows:



"Well, ladies and gentlemen, there is no testimony as to who the owner is. And the owner at the time of the accident could have been anyone in the State of New York including the defendant. And I submit to you that that does not have a bearing on this case because like the People can pay \$2.00 and get the owner and do a little investigation, the defendant can pay the \$2.00 and do a little investigation, although he doesn't have to. Make no bones about that. But he could if he wanted to." (Exhibit E)

In effect, the prosecution asked the jury to consider the fact that petitioner did not testify on his own behalf. The prosecution attempted to shift the burden of proof onto the defendant in a case where the jury had the difficult task of distinguishing between his testifying before the Fourth Additional December 1970 Grand Jury and his constitutional right not to testify before the petit jury sitting in judgment of petitioner.

Both counsel for the petitioner and the prosecutor made reference to the fact that petitioner was a legislator and was involved in state and community politics.

With the conclusion of summations defense counsel requested again "that the Court charge with respect to failure of the defendant to take the stand." (Exhibit F).

In response to the request of defense counsel and pursuant to C.P.L. 300.10 the Court charged:

"Now I want to make it clear to you that under our law the defendant may testify as



a witness in his own behalf. In this case the defendant did not take the stand in his own behalf, however, the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn." (The Court's charge is annexed hereto as Exhibit G).

At no time did the Court charge the jury that the law does not compel a defendant in a criminal case to take the witness stand and testify. Nor was the jury charged that every defendant has the right to stand mute. The Court's charge on the failure of petitioner to testify stressed that he could have testified in his own behalf in this trial and then proceeded to emphasize that petitioner had taken the stand and testified in the Fourth Additional December 1970 Grand Jury. After reading the indictment the Court read the stipulated testimony of petitioner's testimony to the jury. The Court described the function and responsibility of the Grand Jury in some detail but did not caution the jury that while petitioner did take the witness stand in the grand jury, he was under no obligation to do so at his trial.

With the conclusion of the Court's charge, defense counsel took express exception:

"...to the Court's charge with respect to the failure of the defendant to take stand on the grounds that the opinion of counsel was inadequate to cover the particular point."

The Court's reply to these exceptions was, "You have an exception". (Exhibit H ~~at p.~~ )



7. Petitioner has no other adequate remedy to attack the present restriction upon his liberty and his forthcoming surrender to begin serving his six month term of imprisonment.


8. No previous application has been made for the writ herein asked for.

9. Petitioner has submitted a motion to resentence defendant in the interests of justice.

WHEREFORE, your petitioner respectfully prays (1) that a Writ of Habeas Corpus be granted and an Order be entered discharging him from his obligation to serve a six month sentence in the custody of the New York City Department of Corrections, or in the alternative, that respondents be ordered to show cause why petitioner should not be discharged from his obligation to serve said sentence; and (2) that pending the determination of the application herein let all proceedings pending against the petitioner, concerning Indictment 1404/71 be stayed; (3) that this Court grant such other, further, and different relief as to this Court may seem just and proper under the circumstances.

DATED: New York, New York

30<sup>th</sup> Day of December 1975

  
CALVIN WILLIAMS



STATE OF NEW YORK :  
COUNTY OF : SS

, being first sworn under oath,  
presents that he has subscribed to the above and does state  
that the information therein is true and correct to the best  
of his knowledge and belief.

*William Williams*

SUBSCRIBED and SWORN TO before  
me this 30<sup>th</sup> day of December 1975

*Peter H. Sherman*

PETER H. SHERMAN  
Notary Public, State of New York  
No. 21-6607506  
Qualified in Kings County  
Commission Expires March 30, 1977

EXHIBITS ANNEXED TO FOREGOING PETITION



INDICTMENT  
**INDICTMENT**

Supreme Court of the State of New York  
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

against

**CALVIN WILLIAMS**

Defendant

INDICTMENT NO. 1404/71

COUNTS

**PERJURY IN THE FIRST DEGREE (one count)**

A TRUE BILL

**EUGENE GOLD**  
District Attorney

\_\_\_\_\_  
Foreman



Indictment  
FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant of the crime of PERJURY IN THE FIRST DEGREE, committed as follows:

The defendant, on or about June 26, 1972, in the County of Kings, being then and there a witness before the December 1970 Term Fourth Additional Grand Jury and being then and there a witness sworn in due form to tell the truth, the whole truth and nothing but the truth, said oath having been duly administered by the Foreman of the said Grand Jury, the defendant did then and there testify that on August 9, 1970, he was operating a motor vehicle at the time said motor vehicle collided with two parked motor vehicles in front of 213 Marian Street, County of Kings.

Whereas, in truth and in fact, the defendant was not the operator of said motor vehicle at the time it collided with the two parked motor vehicles in front of 213 Marian Street, County of Kings and was not present at the said location at the time of the said accident.

The said testimony was material to the Grand Jury investigation in that the above mentioned Grand Jury was then and there and had been conducting an investigation into the facts and circumstances surrounding the said automobile accident and that it became material to the Grand Jury



## Indictment

investigation to determine the identity of the driver of the motor vehicle when it collided with the two parked motor vehicles.

EUGENE GOLD  
District Attorney  
Kings County



EXHIBIT B - LAW JOURNAL DECISION OF  
SUPREME COURT

By Hopkins, Acting P.J.;  
Martuscello, Latham, Brennan and  
Munder, JJ.

PEOPLE & C. res. v. CALVIN  
WILLIAMS, ap.—Judgment of the  
Supreme Court, Kane County, ren-  
dered Sept. 27, 1974, affirmed. No  
opinion.

The case is remitted to the  
Supreme Court, Kane County, for  
proceedings to direct appellant to  
surrender himself to a court in  
order that execution of the judg-  
ment be procured or resumed  
(CPL 460.50, subdv. 5).



# State of New York

## Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

---

THE PEOPLE OF THE STATE OF NEW YORK

against

CALVIN WILLIAMS

---

CERTIFICATE  
DENYING  
LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,\* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York , New York  
December 10 , 19 75

---

Associate Judge

\*Description of Order:

Order of the Appellate Division, Second Department dated June 19, 1975 affirming judgment of the Supreme Court of Kings County entered on the 27th day of September, 1974.



ABSTRACT OF THE TESTIMONY OF CALVIN WILLIAMS BEFORE THE  
FOURTH ADDITIONAL DECEMBER 1970 GRAND JURY, JUNE 26, 1972

CALVIN WILLIAMS,  
RESIDING AT 467 Macon Street,  
Brooklyn, New York, having  
been duly sworn, testified  
as follows:

.....

Q. Do you recall being involved in an automobile  
accident that occurred on August 9, 1970, in the vicinity of  
Marion Street, in the County of Kings?

A. Yes.

Q. Will you tell the Grand Jury, what, if anything,  
you recall concerning that accident?

A Yes. It was in the afternoon and a summer afternoon.  
I was driving down the street and scraped two parked cars  
that was parked.

Q What time in the afternoon was that?

A I don't recall. It was in the dusk of the afternoon.



are certain questions that we would like to know. Aren't there? And Mr. McKinney brought them up.

Where is that, the owner of that car? The owner of that car, that dark blue Dodge? Where is he? Mrs. Williams put down the license number, gave the number to the lawyer. He could pay his \$2.00 and call up Albany and get the owner.

Well, ladies and gentlemen, there is no testimony as to who the owner is. And the owner at the time of the accident could have been anyone in the State of New York including the defendant. And I submit to you that that does not have a bearing on this case because like the People can pay \$2.00 and get the owner and do a little investigation, the defendant can pay the \$2.00 and do a little investigation, although he doesn't have to. Make no bones about that. But he could if he wanted to.

And likewise he says, Mr. McKinney, the multitude that's on the street and here they bring you only six witnesses to testify, four related and two friends and neighbors. What happened to the other people? All right, what happened to the other people? Who knows. You would have to speculate, wouldn't you? You have to guess. You don't know if there were



## EXHIBIT F - REQUEST TO CHARGE

MR. McKINNEY: Your Honor, so the record will reflect what I have already requested of your Honor, the defendant specifically requests that the Court charge with respect to failure of the defendant to take the stand.

THE COURT: All right. I am also going to charge the People are not required to prove motive as part of their case. But that it is a factor that may be taken into consideration by the jury in making their determination.

Is that right?

MR. McKINNEY: Yes, your Honor.

MR. FRIEDMAN: Fine, sir.

THE COURT: All right, we are ready for the jury.

(The jury enters the courtroom.)

THE CLERK: All sworn jurors are present. The defendant and counsel are personally present in court. Also present is Mr. Friedman, the Assistant District Attorney.

Jurors, please harken to the charge of the Court.



McGROVER, J.S.C.

(THE COURT CHARGES THE JURY AS FOLLOWS:)

Good morning.

Ladies and gentlemen, the People of the State of New York have called upon you to render a most important service. A citizen can perform no greater service in time of peace than jury duty. No other service requires a greater degree of intelligence, fairness, patience, integrity and courage.

A jury assumes great responsibility when he sits in judgment upon another and determines the issues that may arise in the trial between the People of the State of New York and the defendant. Although you knew that such service would involve such responsibility you responded to that call in the spirit of true American fairness. For such service I send to you my profound thanks.

Now, at this time I want to pay compliments to both lawyers irrespective of the little things that may have arisen during the trial, or rather during this important trial, for the manner of their presentation and preparation of their respective cases. I also want to thank them both for their courteous manner in which they conducted



themselves throughout the trial, generally speaking.

Now, their personal opinions are not to be considered by you because in the end and ultimately it is your decision that is binding upon the evidence as you find it and the inferences that you draw from the evidence.

In other words, you are not to be bound by their personal opinions, and I will refer to their summations later on but in any event, I do want to pay my compliments to them for their preparation and presentation of the case to you and to the Court.

Now this Court consists of two parts, the jury and the Judge. You, the jury, are the sole and exclusive judges of the facts.

I think I forgot this part. Both the People and the defendant are entitled to a fair and impartial trial. Both must receive equal consideration under the law. Counsel for both sides have chosen you upon your sworn promise to ~~render a verdict~~ based solely on the evidence and the law.

You, the jury, are the sole and exclusive judges of the facts. As judges of the facts you are naturally the sole and exclusive judges of the



credibility of the witnesses. It is for you to say how much weight and how much belief you will give the testimony of any witness.

If you believe that a witness has willfully testified falsely concerning a material fact in this case the law gives you the right to reject and disregard that witness's entire testimony although you are not bound to do so. You may disregard so much of the testimony as you find to be false and may accept so much of it as you believe to be true.

In determining the weight or belief you will give to the testimony of any witnesses you may take into consideration his manner and demeanor on the witness stand. Any motive he or she may have in telling anything but the truth, or any interest they may have in the outcome of the case, or their bias for or prejudice against anyone.

In judging the facts and the credibility of the witnesses you are to use your common sense. The quality of their testimony is controlling, not the quantity of the testimony or the number of witnesses testifying for one side as against the other.



Now let me give you another rule of law that comes into play here too. There is apparently, so far as one or two witnesses is concerned, maybe more, you may have found some inconsistent statements.

Now the word inconsistent, you know what it means. It means different at one time from another time.

Now this is the rule. The evidence that comes from this witness stand is the evidence in chief. That's the evidence that you're concerned with. In other words, you're concerned with the evidence or the testimony that the witness here gives on the witness stand and the evidence comes only from the witness stand. If at any time it is elicited from any witness that at another time or in another place under oath or otherwise, he or she may have given statements contrary to what he or she said here, you do not say to yourselves: "Did he or she tell the truth here or did he or she tell the truth there?" Because you are bound by the evidence that they gave here. But if you find that he or she gave any inconsistent statements--and if you so find--at some other place, you are to say to



yourselves: "Shall I consider it, whether or not the inconsistency affects the credibility here."

In other words, the inconsistent statement affects their credibility as to whether or not they are telling the truth on the witness stand at the present time. It is for you to say, if it does, to what extent it affects their credibility. I hope I make myself clear.

In other words, you are weighing the witness's credibility and you are using that as a measure of credibility in the scale of justice and if you find that any statement he gave elsewhere is inconsistent then you use that in determining what weight or what credibility that you give to that witness, that is, the evidence that they have testified to here. Is that clear? Is that clear? I hope.

Now let me say to you, in all fairness, you are to use the same yardstick in measuring the value and force of all testimony whether given by a police officer or any other witness and give it the same weight and credence, all things being equal. The fact that a witness is a police officer does not qualify him as a witness. Such a witness is no better nor, on the other hand, he is no worse than




any other witness in the case. He must be treated just the same as any other witness and his testimony must not be arbitrarily excluded merely because he is a member of the police force.

On the other hand, you must check and test his credibility or testimony in precisely the same manner as you would the testimony of any other witness. In this connection it may be considered by you that it is the duty of the police to discover crime, ferret out the criminal, collect evidence and turn it over to proper authorities so that those accused of unlawful and criminal acts may be dealt with according to law.

Therefore, I say to you whatever faith you attach to the testimony of a witness, be it a police officer or any other person, rests entirely with you and each witness must be fairly and impartially considered by discriminating knowledge in the light of your experience and common sense with a view to determining whether that witness had a motive or an interest to speak other than the truth.

Now I want to make it clear to you that under  
our law the defendant may testify as a witness in





his own behalf. In this case the defendant did not take the stand in his own behalf, however, the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn.

Now, my function is to preside at the trial. To conduct it fairly, impartially and in an orderly manner. To charge you upon the law. To rule upon objections, motions and the admissibility of evidence. You must accept the law from me. You are bound by my rulings. As you are supreme in the determination of the facts, in the appraisal of the credibility of the witnesses and the determination of the weight and sufficiency of the evidence and the guilt or innocence of the defendant, the Court is supreme in the determination of the law. We must not invade each other's province.

When I made rulings upon questions of law, upon motions, upon objections or upon admissibility of evidence, I did not make them arbitrarily. I made them in accordance with my knowledge of the law. I did not intend by any ruling I made or any questions that I asked to convey to you that



I entertained any opinion whatsoever as to the guilt or innocence of the defendant. The law forbids a judge in any manner in this state to express or to indicate any opinion concerning the guilt or innocence of a defendant.

Now, there is no necessity for me to review the facts in this case. You heard the testimony. You heard it analyzed by both counsel in detail and there is no need for me to summarize the evidence again.

If there is any doubt about the evidence you can have it re-read to you. It will be your recollection of the evidence that counts. It's not mine, it's not counsel's, it's your recollection that counts and if there is any dispute among you as to what the evidence is, as I say, we can have it re-read to you.

Now, the indictment in this case contains one count. It reads as follows.

Can I have the indictment itself.

Perhaps before I read the indictment I think it might be relevant for me to point out to you what the function of a Grand Jury is and then I will tell you what the force of the indictment is.



A Grand Jury is made up of twenty-three citizens chosen by lot in a manner provided for by law. It has many functions, one of which we are concerned with here. It is an arm of the court. It serves ordinarily for approximately a month at a time, each Grand Jury. The members of the Grand Jury are chosen and duty bound and sworn to inquire into crimes committed in the County of Kings and to conduct investigations concerning crimes and criminals, criminal activities in the County of Kings. They have the power to subpoena. They have the power to appoint a foreman. They have the power to elect a secretary. They have the power to subpoena any witness or document of each and every person that they deem relevant and necessary to its function.

All people must obey subpoenas of the Grand Jury. Unless a justice of the Supreme Court--if it is a Grand Jury action--vacates the subpoena, everyone must obey it. Their proceedings are secret. They are governed by law. They are attended by a prosecutor and they must present only legal and competent evidence and no other, and they only hear one side--well, they only hear



what evidence may be presented to them.

Now, as I said, the Grand Jury in this case indicted the defendant for perjury in the third degree and the indictment reads as follows:

The Grand Jury of the County of Kings by this indictment accuse the defendant of the crime of perjury in the first degree committed as follows:

The defendant, on or about June 26, 1972 in the County of Kings, being then and there a witness before the December, 1970 Term, fourth additional Grand Jury, and being then and there a witness sworn in due form to tell the truth, the whole truth and nothing but the truth, said oath having been duly administered by the foreman of the said Grand Jury, the defendant did then and there testify that on August 9, 1970 he was operating a motor vehicle at the time said motor vehicle collided with two parked motor vehicles in front of 213 Marion Street, County of Kings. Whereas in truth and in fact the defendant was not the operator of said motor vehicle at the time he collided with two parked motor vehicles in front of 213 Marion Street, County of Kings, and was not present at said location at the time of said action. The said



testimony was material to the Grand Jury investigation in that the above mentioned Grand Jury was then and there and had been conducting an investigation into the facts and circumstances surrounding the said automobile accident and that it became material to the Grand Jury investigation to determine the identity of the driver of the motor vehicle when it collided with the two parked motor vehicles.

Now that's the indictment. Now, what is the function of an indictment?

The defendant, upon arraignment, pleaded not guilty to this indictment. Under our law an indictment is a written accusation by a Grand Jury charging the defendant with the commission of a crime. It is without probative force and carries with it no implication or suspicion of guilt. That's the indictment itself and that's the force and effect of the indictment itself.

Now, in connection with the indictment and the charge I think I ought to read to you the testimony that was given by the defendant before the Grand Jury. You recall what the indictment says and here is the testimony which was put on the record as to what the defendant actually testified before the Grand Jury.



You recall it was put in the record and was read to you. I will re-read it to you so you will be clear in your own mind as to actually what he did testify to before the Grand Jury. This is the stipulation that is entered into by the counsel for the People and also by counsel for the defendant.

Calvin Williams, being duly sworn, testified as follows:

"Question: Do you recall being involved in an accident"--no.

"Do you recall being involved in an automobile accident that occurred on August 9, 1970 in the vicinity of Marion Street in the County of Kings?

"Answer: Yes.

"Question: Will you tell the Grand Jury what, if anything, you recall concerning that accident.

"Answer: Yes, it was in the afternoon and a summer afternoon. I was driving down the street. I scraped two parked cars that were parked.

"Question: What time of the afternoon was that?

"Answer: I don't recall. It was in the dark of the afternoon."

Now, it is the People's contention that on the date the accident occurred that the defendant was,



as you recall from the indictment, that the defendant was not driving the vehicle involved in the accident as he stated before the Grand Jury but that the vehicle involved in the accident was driven by a young man. And you recall the proof that they have submitted in that respect.

The defendant in his plea, by his plea of not guilty as I pointed out before, denies each and every allegation of the indictment.

Now, Section 210.15 of the Penal Law reads as follows: A person is guilty of perjury in the first degree when he swears falsely and when his false statement, A, consists of testimony, and B, is material to the action, proceeding or matter in which it is made.

Now, as to the part that it's material to the action or proceeding or matter in which it is made, here we also have a stipulation or agreement by counsel which was entered on the record to the effect that the question asked of the defendant before the Grand Jury--that the questions asked of the defendant before the Grand Jury which were the subject of the indictment were material and relevant to the investigation that the Grand Jury was conducting.



In other words, you don't have to consider the question as to whether it was material or not. There is a concession made that it was material, if made.

Is that clear? I hope it is, anyway.

In other words, according to the Penal Law, first of all, a person is guilty of the crime of perjury in the first degree when he swears falsely and his false statement consists of testimony. And another element would be that it would be material to the action of the above proceeding or matter in which it is made.

Here there was a concession that if made it was material so you don't have to consider that element. The only element you have to consider would be whether it was falsely made, and as I will point out later on, whether it was intentionally made and also whether there was corroboration.

All right? But as to materiality, you don't have to consider that.

Now I will give you some definitions but I think actually what the meaning of the terms are, I think you can understand without me even giving you definitions. But I will give you the definitions



set forth in the Penal law and also the law so that it will be very clear to you.

Swear means to state under oath, and here it is conceded that the defendant did swear under oath. And he gave testimony before the Grand Jury and I think it is conceded that he did testify under oath before the Grand Jury.

But testimony means an oral statement made under oath in a proceeding before any court or body, agency, servant or other person authorized by law to conduct the proceeding and to administer the oath or cause it to be administered. The Grand Jury is such a body within that section.

Now, swear falsely--and this is the one we are concerned about--swear falsely, a person swears falsely when he intentionally makes a false statement which he does not believe to be true while giving testimony.

False swearing, swear falsely, a person swears falsely when he intentionally makes a false statement which he does not believe to be true while giving testimony.

Now, the definition of swears falsely contains six basic elements.



A statement by the defendant. Here you have a statement by the defendant.

Intentionally made. That will be for you to determine.

False, meaning that which is not coupled with a lying intent. That will be for you to determine.

Made under oath. I think that's conceded.

And not believed to the maker to be true when made. That will be for you to determine.

Material to the issues. That's been conceded.

Now, to prove the defendant guilty beyond a reasonable doubt the People must prove that the lawful oath was administered to the defendant by a competent authority. In this case the oath was admitted--was administered by the foreman of the Grand Jury.

That the defendant gave testimony which was false. The law is that in any prosecution for perjury the falsity of a statement made may not be established by the uncorroborated testimony of a single witness.

In this respect Section 210 of the Penal Law provides, in any prosecution for perjury, and it states as follows: Falsity of a statement may not



be established by the uncorroborated testimony of a single witness.

Now, this is known as the two witness rule. To prove that the defendant's testimony was false beyond a reasonable doubt the People in this case must prove the falsity of the statement of the defendant by at least two witnesses who testify that the defendant violated his oath when he testified before the Grand Jury.

It is the People's contention that the necessary corroboration was furnished in this case by the witnesses Eunistine Williams, Barbara Humbert, Myrtis Barlow, Samuel Dantzler, Daniel Williams, and Steve Wilson when they testified that the defendant was not in the car at the time of the accident but that a young man was driving the automobile or vehicle in question.

In order to find the defendant guilty of perjury in the first degree you must find beyond a reasonable doubt that there was corroboration as to the falsity of this statement made by the defendant.

As to the other necessary elements, that is the intent of the defendant to make the alleged false statement and state of mind of the defendant at the



time of the making of the alleged false statement, these two elements need not be corroborated.

The defendant's state of mind at the time that the alleged false statement was given is for you, the jury, to determine.

A specific intent is required for perjury to exist, that is a statement to be perjurious must be false and made intentionally by the defendant as opposed to being mistakenly or inadvertently made. It must be made with the belief that the statement is false at the time the defendant swears that the statement is true.

Intent and belief are the secret and silent operations of a person's mind. They are not something that can be photographed. When you determine another's intent or belief you are actually probing that person's mind to determine just what he had in mind at the time he is alleged to have committed this particular act.

Intent and belief must be inferred from all the facts and circumstances in the case connected with the individual about whom you are inquiring. By what he said, by what he did, by his conduct and his speech or by a combination of all.



Under our law a person is presumed to intend the natural and probable consequences of his act. This presumption, like all other presumptions, may be accepted or rejected by you.

Now, I might also point out that the People are not required to prove motive but it is a factor that may be considered by you in this case in making your determination. But they are not required to prove motive. All right?

Now, just to sum up at this time, if the People have proven all the elements of the crime of perjury in the first degree as I set them forth to you--if they haven't proven all those elements then you must find the defendant not guilty. However, if you find all the evidence has been proven beyond a reasonable doubt then you must find the defendant guilty as charged. But I will sum it up again for you.

Now, under our law every defendant indicted for a crime is presumed to be innocent of that charge or the charges made against him. That presumption of innocence belongs to and remains with him throughout the entire trial and it is his until such time as you, the jury, unanimously agree that by the credible evidence his guilt has been established



beyond a reasonable doubt. When such time comes the presumption of innocence ceases.

The law states further that the burden of proving the guilt of a defendant rests at all times upon the prosecution. A defendant under our law is not obliged, not obliged to prove his innocence. Before you can find a defendant guilty you must be convinced that each and every element of the crime charged and his guilt have been established beyond a reasonable doubt. Evidence which is equally balanced is, naturally, not beyond a reasonable doubt.

Evidence consists of oral testimony, stipulations and exhibits that were admitted in evidence during the trial.

Here the defendant, again as I pointed out, by his plea of not guilty denies his guilt and every material issue raised by the prosecution is put before you because of that denial. That denial throws upon the prosecution, as I have already instructed you, the burden of proving every essential fact necessary to his guilt before a verdict of guilty can be reached.

Now, what is a reasonable doubt? I will give



you the definition as set forth by the Supreme Court in the United States.

A reasonable doubt is an actual doubt that the jury is conscious of having after going over in their minds the entire evidence in the case, giving consideration to all the testimony and each and every part thereof. If then you feel uncertain and not fully convinced by the evidence or lack of evidence that the defendant is guilty of the crime charged and if you believe that you are acting in a reasonable manner and if you likewise believe that a reasonable man in a matter of like importance would hesitate to act because of a doubt as you entertain, the law says you have a reasonable doubt and if you entertain it the law commands you to give the benefit of it to the defendant and he must be acquitted.

In coming to such a conclusion you, ladies and gentlemen, must use the same logic, experience and common sense that you use in deciding any important matter that you may have in your daily business life. You examine the evidence. You consider the credibility of the witnesses. Appraise and evaluate their testimony. You do so without prejudice, without sympathy and you ask yourselves this question. Is there a doubt which



arises from the evidence in this case and from the lack of evidence in this case? Is it a reasonable-- is it reasonable under the circumstances that I should have such a doubt?

If that is your honest opinion the benefit of that reasonable doubt belongs to the defendant. If that is not your honest and conscientious opinion the defendant is not entitled to the benefit of a reasonable doubt.

A reasonable doubt, however, ladies and gentlemen, under our law is not a surmise, it's not a whim or a guess. It is not a subterfuge which any juror may resort to in order to avoid the doing of an unpleasant or disagreeable duty. It is not an imaginary doubt. It is not an unsubstantial doubt. It is a doubt which must be founded on the evidence or lack of evidence, and evidence comes only from the witness stand. It is a doubt that must be founded in reason and it must survive the test of reason.

When I say it must be founded on reason, it must be founded on the evidence or lack of evidence. The law says that before you come to a conclusion of guilt of a defendant you must be convinced that



his guilt has been established to your satisfaction beyond a reasonable doubt, but not beyond all doubt because in many cases the latter would be an impossibility.

Now, if the facts established at this trial are equally susceptible to two inferences, one of which is consistent with innocence and one of which is consistent with guilt, then the law states under such circumstances you must accept the inference of innocence and acquit the defendant.

Now, in deciding the guilt or innocence of the defendant I charge you you're not to be concerned with punishment. You are not even permitted to discuss it. The law provides that the Court must state to the jury that in determining the question of guilt they must not consider the punishment but that it rests with the Judge to mete out or set such punishment as may be provided for by law.

Now, each counsel has summed up. A summation has an important purpose but, ladies and gentlemen, a summation neither substitutes or is it a substitute for the evidence in the case. Each interpreted the evidence and the legitimate inferences he drew therefrom and that he should like you to draw therefrom



from his point of view. Statements of counsel should be considered by you but only if they coincide with your recollection of the evidence adduced and the logical inferences that you drew from that evidence.

It is your obligation as jurors to calmly and patiently discuss the evidence in the case. To agree upon the facts. To make an honest effort to agree upon the facts. To apply the law given to you by the Court without question.

While it is the duty of every juror to discuss and consider the opinion of his fellow jurors you must decide the case on your own individual judgment. No juror is required to surrender any conscientious view he entertains which is founded upon the evidence. It is your duty to agree upon a verdict without a surrender of your own personal opinion as a juror on all the evidence in the case.

Now let me once more sum up for you the issues in the case. The questions for you to resolve are, did the defendant intentionally testify falsely before the Grand Jury on August 9, 1970 and was the testimony of the People's witnesses corroborated by one or more credible witnesses.

Now, have the People established to your



satisfaction beyond a reasonable doubt these elements of the crime charged, perjury in the first degree, together with all the other elements that I may have referred to previously in my charge. If the People have sustained this burden of establishing all the elements of the crime charged then you must find the defendant guilty. If they have not sustained that burden then you must find him not guilty.

Now, members of the jury, let your decision be free from prejudice. If you render a verdict based solely on the evidence both sides will have received their day in court. Under our law no one is preferred, no one is exempt. No innocent person should be convicted and no person whose guilt has been established to your satisfaction beyond a reasonable doubt should be acquitted.

Let your verdict reflect an honest and intelligent and a logical solution of the only issue that has been presented to you, did the District Attorney by credible evidence establish the guilt of this defendant to your satisfaction beyond a reasonable doubt on the count presented to you.

Now, your verdict must be unanimous and it can be either not guilty or guilty.



Now, are there any exceptions or requests to charge? If not I will excuse the jury.

MR. McKINNEY: In the absence of the jury.

THE COURT: Would you take the jury out, please.  
(The jury leaves the courtroom.)

MR. McKINNEY: If it may please the Court, I have two exceptions.

Number one, I respectfully take exception to the Court's charge with respect to the failure of the defendant to take the stand on the grounds that the opinion of counsel was inadequate to cover the particular point.

And secondly, I object to the Court's conclusion in the charge, instructions to the jury with respect to the function of the Grand Jury in that during that particular section of the charge the Court referred to the Grand Jury as an arm of the court and although that may in fact be true, the suggestion is that by reason of the fact that the Grand Jury indicted this defendant and it was an arm of the court, that the Court in effect has taken a position with respect to the guilt or innocence of the defendant.

When I say the Court, I don't mean Mr. Justice



McGrover sitting and presiding over this court,  
but the Court as an institution.

And I further object--well, that's the extent  
of the objections, your Honor.

MR. FRIEDMAN: I have no objections.

THE COURT: You have an exception.

All right, you can bring them back.

What do you want to do about the alternates?

MR. McKINNEY: Your Honor, based on some experience I think we better have them around, isolated but around and available.

MR. FRIEDMAN: Yes, sir.

THE COURT: All right.

THE COURT OFFICER: The jury is entering.

(The jury enters the courtroom.)

THE COURT: Jurors, you may retire to deliberate and the two alternates, you will have to remain. You're not to discuss the case among yourselves in the event that you might be called to deliberate and so, while you can talk about the baseball games or something else, you can't talk to each other about the case at all.

Do you understand that?

(The two alternate jurors answer in the affirmative)



## AFFIDAVIT OF MARK M. BAKER IN OPPOSITION (Filed January 26, 1976)

IN THE UNITED STATE DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

----- X

CALVIN WILLIAMS,

Petitioner,

-against-

A F F I D A V I T

ATTORNEY GENERAL OF THE STATE OF NEW YORK,  
DISTRICT ATTORNEY FOR THE COUNTY OF KINGS,  
CORPORATION COUNSEL FOR THE CITY OF NEW YORK,  
COMMISSIONER, NEW YORK CITY DEPARTMENT OF  
CORRECTIONS, and PRESIDING JUSTICE OF THE  
SUPREME COURT, KINGS COUNTY, PART 27.,

75 C 2196

Respondents.

----- X

STATE OF NEW YORK)

)ss.:

COUNTY OF KINGS )

MARK M. BAKER, being duly sworn, deposes and makes the  
following statement:

That I am an attorney-at-law and an Assistant District  
Attorney of the County of Kings, Brooklyn, New York, duly admitted  
to practice in the Courts of the State of New York, and the United  
States District Court for the Eastern District of New York.

That I make this affidavit upon information and belief  
in answer to an order to show cause why a writ of habeas corpus  
should not issue in the above-captioned matter.

That the cause for petitioner's restraint, save for his  
posing of the requisite bail pending appeal in the Courts of the  
State of New York, is a judgment of conviction of the crime of  
Perjury in the First Degree (New York Penal Law §210.15), dated  
December 27, 1974, for which petitioner was sentenced to a term  
of imprisonment with the New York City Department of Correctional  
Services for a period of six months. Said judgment of conviction  
was affirmed by the Appellate Division, Second Department, on



June 19, 1975, with leave to appeal to the Court of Appeals denied on December 10, 1975, by the Hon. Jacob Fuchsberg, Associate Judge.

That the constitutional errors which petitioner now alleges in support of his application were essentially those advanced before the New York appellate courts, which, in view of the affirmance of his conviction, were ostensibly unavailing.

#### PROSECUTOR'S SUMMATION

That it should be initially noted that petitioner had failed to object to any statements by the assistant district attorney in the course of his summation and consequently, as noted in respondents' brief in the state court, his complaints were not properly preserved for review.

That in any event, while the prosecutor did indeed state to the jury that which is reproduced on page 5 of the petition, petitioner's papers do not make reference to those representations of defense counsel to which the assistant district attorney's statements were in reply. Accordingly, since, as shown in respondents' Appendix, defense counsel raised the point that the People had not proved who had been the actual owner of the car and that "if you send the \$2 the registered owner is John Jones at 777 Stuyvessant Avenue," the prosecutor's comment should only be considered in light of that which literally compelled their utterance, and as such, constituted fair rejoinder. Cf. United States v. LaSorsa, 480 F. 2d 522 (2d Cir. 1973), cert. denied 414 U.S. 855; United States v. McCarthy, 473 F. 2d 300 (2d Cir. 1972); United States v. Lipton, 467 F. 2d 1161 (2d Cir. 1972), cert. denied 410 U.S. 927.



COURT'S COMMENTS ON PETITIONER'S NOT TESTIFYING

That similar to trial counsel's lack of objections, as noted in our response above, counsel's exception to the court's charge on petitioner's not having testified was deficient in that he merely stated that it was "inadequate to cover the particular point" (Petition, page 6). Respondents would adhere therefore to their argument in the state courts where it was observed that what counsel meant, in view of his failure to further amplify his misgivings, was certainly subject to conjecture, and undoubtedly not properly imparted to the trial court. Consequently, it was urged by respondents that such was not sufficient an exception to allow review as a matter of law. Cf. United States v. VanDrunen, 501 F. 2d 1393, 1395 (7th Cir. 1974), cert. denied 95 Sup. Ct. 684.

That on its merits, petitioner's claim of constitutional prejudice is inherently untenable. The court's charge was not indicative one way or the other as to why petitioner had not chosen to take the stand but was merely advisory to the jury of the substance of counsel's request that "the fact that [petitioner] did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn." The statute itself (i.e., Criminal Procedure Law §300.10[2]) in fact reads no differently.

That petitioner's authority in support of his proposition that he was harmed by the instruction is manifestly inapposite. In the case sub judice, no negative inferences were drawn as against the accused for not testifying. Nor was the jury implicitly imbued with the suggestion that he had something to hide. Cf. People v. McLucas, 15 N Y 2d 167 (1965); United States v. VanDrunen, supra. In this regard, there is a broad distinction between



where a court states that a defendant refused to testify and that at bar where it was merely recognized that petitioner had no obligation to testify, although he had had the right to do so.

That significantly, the court's instructions to the jury were not unsolicited comments which infringed on petitioner's constitutional right to remain silent (cf. cases cited by petitioner viz. Cloud v. United States, 361 F. 2d 627, 630 [8th Cir. 1966]; Davis v. United States, 357 F. 2d 438, 441 [5th Cir. 1966]), but instead, were specifically given at the behest of the petitioner, who in effect, was allowing his silence to be called to the jury's attention. Were this not the case, concededly, any instruction would have indeed been out of order. (New York Criminal Procedure Law §300.10[2].)

That assuming for argument and for argument only, such was in fact error, respondents would submit that petitioner's reference to Chapman v. California, 386 U.S. 18 (1967) inures to his detriment. Assuredly, in view of the overwhelming evidence of petitioner's perjury that was adduced at trial, any constitutional defect, if existent at all, can only be deemed of harmless dimensions.

WHEREFORE, for the foregoing reasons, it is respectfully requested that the within petition be in all respects dismissed.

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MARK M. BAKER

Sworn to before me this  
day of January, 1976



APPENDIX TO AFFIDAVIT

52a

this would never have been necessary.

Mrs. Williams takes the piece of paper. She says she went to her lawyer. The lawyer sends out a request to the Motor Vehicle Bureau.

Who is the registered owner of this car? The registered owner of this car, if you send \$2.00, the registered owner of this car is John Jones at 777 Stuyvesant Avenue.

The District Attorney's Office, the police department or the lawyer himself can send a private investigator to that address, speak to the registered owner of the car and ascertain whether or not the registered owner was driving the car that night, whether someone else was driving it with his permission, whether or not the car was stolen. That is the very simple means of determining who was driving that car. It was never done and the reason it was never done and the reason that you have no license plate number here other than the only document that is in this case, the only document in this entire case put into evidence by the defendant, Defendant's Exhibit B in evidence. This is it. This is the official record kept in the regular course of the business of the Police



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - -x

CALVIN WILLIAMS,

Petitioner.

75 C 2196

-against-

OPINION AND ORDER

January 27, 1976

ATTORNEY GENERAL OF THE STATE OF  
NEW YORK, DISTRICT ATTORNEY FOR THE  
COUNTY OF KINGS, CORPORATION COUNSEL  
FOR THE CITY OF NEW YORK,  
COMMISSIONER, NEW YORK CITY DEPARTMENT  
OF CORRECTIONS, and PRESIDING JUSTICE  
OF THE SUPREME COURT, KINGS COUNTY,  
PART 27,

Respondents.

- - - - -x

PLATT, D.J.

By order to show cause, verified petition for a writ of habeas corpus and exhibits attached, petitioner seeks an order restraining the defendants from executing a six months sentence of imprisonment imposed by The Hon. Albert S. McGrover, Justice of the Supreme Court, Kings County, after a jury trial and a verdict upon a charge of perjury, or, in the alternative, for a writ of habeas corpus discharging petitioner from custody as of the day he is incarcerated.

On the return date of the petitioner's motion, counsel for the defendants agreed to an interim stay pending this Court's determination thereof.



Petitioner's conviction of perjury in the first degree was affirmed by the Appellate Division, Second Dept., on June 19, 1975, without opinion, and on December 10, 1975, the New York Court of Appeals denied leave for petitioner to appeal to that Court, without opinion.

Petitioner claims that the judgment of conviction was imposed upon him in violation of his right against self incrimination under the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutor's remarks in his summation to the jury and the trial court's charge to the jury.

The principal ground advanced by counsel for the petitioner on this motion and application for a writ was the trial court's failure to charge the jury that the law does not compel a defendant in a criminal case to take the witness stand and testify and that every defendant has the right to stand mute.

It should be noted at the outset that no such request was made by counsel for the petitioner prior to or at the conclusion of the Court's charge. An examination of the records shows that prior to the charge the trial court said to petitioner's then counsel (A 66):

"THE COURT: Yes, I assume too you want me to charge failure to take the stand in this case.

MR. McKINNEY: Yes, your Honor, I will try to provide the Court with some requests to charge."



Immediately prior to the Court's charge the record discloses that (A 140):

"Mr. McKINNEY: Your Honor, so the record will reflect what I have already requested of your Honor, the defendant specifically requests that the Court charge with respect to failure of the defendant to take the stand."

The Court charged the jury as follows (A146-A147):

"Now I want to make it clear to you that under our law the defendant may testify as a witness in his own behalf. In this case the defendant did not take the stand in his own behalf, however, the fact that he did not testify is not a factor from which any inference whatsoever unfavorable to the defendant may be drawn."

At the conclusion of the charge, the then counsel for the petitioner stated (A 166):

"Mr. McKINNEY: If it may please the Court, I have two exceptions.

Number one, I respectfully take exception to the Court's charge with respect to the failure of the defendant to take the stand on the grounds that the opinion of counsel was inadequate to cover the particular point."

Under § 300.10(2) of the New York Criminal Procedure Law,

"In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. \* \* \* Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn."

As indicated above, the trial court in this case so charged.



In United States v. Van Drunen, 501 F.2d 1393, 1395-1396 (7th Cir. 1974), cert. denied 419 U.S. 1091 95 S.Ct. 684 (1974), the trial court charged the jury as follows:

"A defendant has the absolute right to testify, and the jury must not draw a presumption of guilt or any inference against the defendant because he did not testify."

"A defendant who wishes to testify is a competent witness and his testimony should not be disbelieved merely because he is the defendant. However, in weighing his testimony the jury should consider the fact that the defendant has a vital interest in the outcome of this trial."

and the Court of Appeals for the Seventh Circuit held that such charge did not constitute reversible error since the court included the phrase that "the jury must not draw a presumption of guilt or any inference against the defendant because he did not testify". (See also Boehm v. U.S., 123 F.2d 791 (8th Cir. 1941), cert. denied 315 U.S. 800, 63 S.Ct. 626, rehearing denied 315 U.S. 828, 62 S.Ct. 794.)

A fortiori in the case at bar, if the foregoing instructions by the trial judge in the Van Drunen Federal case did not constitute reversible error, the New York State Court trial judge's failure to include an unrequested instruction with respect to a defendant's right not to take the stand and testify should not constitute a violation of his constitutional rights.



Similarly, the remarks of the prosecutor in his summation which petitioner claims "in effect" constituted a request for the jury to consider the fact that petitioner did not testify on his own behalf (even assuming arguendo that they can be interpreted to such effect which is difficult to do) do not constitute a violation of petitioner's constitutional rights.

For the foregoing reasons, petitioner's motion and petition for a writ of habeas corpus must be and the same hereby are denied.

SO ORDERED.

Thomas C. Platt  
U.S.D.J.



**CLOSED**

JUDGMENT (Filed January 29, 1976)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

58a

CALVIN WILLIAMS,

Petitioner,

-against-

ATTORNEY GENERAL OF THE STATE OF  
NEW YORK, DISTRICT ATTORNEY FOR THE  
COUNTY OF KINGS, CORPORATION COUNSEL  
FOR THE CITY OF NEW YORK, COMMISSIONER,  
NEW YORK CITY DEPARTMENT OF CORRECTIONS  
and PRESIDING JUSTICE OF THE SUPREME  
COURT, KINGS COUNTY PART 27

Respondents.

M' FILMED

JUDGMENT

75 C 2196

FILED  
IN CLERK'S OFFICE  
U. S. DISTRICT COURT E.D. N.Y.

★ JAN 29 1976 ★

TIME A.M. ....  
P.M. ....

An opinion and order of the Honorable Thomas C. Platt, United States District Judge, having been filed on January 2, 1976, denying the petitioner's motion and petition for a writ of habeas corpus, it is

ORDERED and ADJUDGED that the petitioner take nothing of the respondents and that the motion and petition are denied.

Dated: Brooklyn, New York  
January 29, 1976

*Lewis Angel*  
Clerk

BEST COPY AVAILABLE



CERTIFICATE OF PROBABLE CAUSE (Filed February 17, 1976)

59a

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
CALVIN WILLIAMS,

Petitioner, .

-against-

ATTORNEY GENERAL OF THE STATE OF NEW YORK, .  
DISTRICT ATTORNEY FOR THE COUNTY OF KINGS, .  
CORPORATION COUNSEL FOR THE CITY OF NEW .  
YORK, COMMISSIONER, NEW YORK CITY DEPART- .  
MENT OF CORRECTIONS, and PRESIDING JUSTICE OF .  
THE SUPREME COURT, KINGS COUNTY, PART 27, .

Respondents. .

75 C 2196

CERTIFICATE OF PROBABLE  
CAUSE

-----X  
I, THOMAS C. PLATT, Judge of the United States District Court for the Eastern District of New York, certify that I have examined the Petition of Calvin Williams for the Issuance of a Certificate of Probable Cause together with the application for a writ of habeas corpus in the United States District Court for the Eastern District of New York, together with the record of the proceedings herein, and find that probable cause exists for the appeal taken in the above named cause to the United States Court of Appeals for the Second Circuit from the order of the District Court, Platt, J., denying petitioner's application for a writ of habeas corpus.

Dated: Brooklyn, New York

February \_\_, 1976

\_\_\_\_\_  
Judge, United States

District Court, E.D.N.Y.



CALVIN WILLIAMS,  
Petitioner- Appellant,

- against -

ATTORNEY GENERAL et.al.,  
Respondents- Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James A. Steele *being duly sworn,*  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
310 West 146th Street, New York, New York

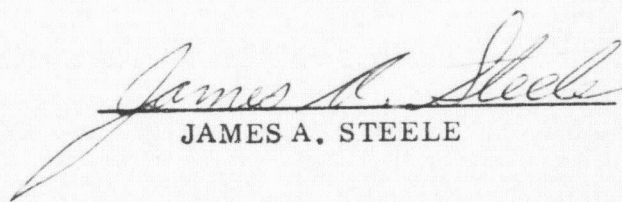
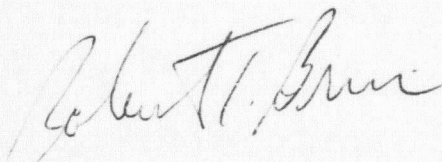
That on the 9th day of April 19 76<sup>th</sup> see attached

deponent served the annexed Appendix ~~Exhibit~~ upon

see attached

the Attorneys in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this 9th  
day of April 19 76



JAMES A. STEELE

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1977



Louis J. Lefkowitz  
Two World Trade Center  
New York, New York 10048

W. Bernard Richland  
Municipal Building  
New York, New York

Eugene Gold  
Municipal Building  
Brooklyn, New York